Clifford

Supreme Court of the United States.

OCTOBER TERM, 1877.

No. 826.

THE MAYOR AND COUNCILMEN OF TROY, PLAINTIFFS IN ERROR,

vs.

EVANS, GARDNER & CO., DEFENDANTS IN ERROR.

The defendants in error in this cause move to dismiss the writ of error and the cause out of this Court, on the ground that this Court has no jurisdiction of the cause; the amount in controversy, at the trial below, claimed by plaintiffs in that court, and the judgment for plaintiffs in that court, being each less than five thousand dollars—the cause having been tried and judgment rendered. after May 1, 1875-

FACTS.

Defendants in error, who were plaintiffs in the court below, in their original complaint had two counts. At the trial, by leave of the court, the first count was stricken out and the trial was had only on the second count. (See Trans., p. 30, recitals of judgment entry.) The amount really claimed in the second count, see body of the count, was only three ten per cent. installments due when suit

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Dismissed

began, and interest on the amount of bonds, being only the sum for which judgment was rendered, May 27th, 1875, which was thirty-nine hundred twenty-six and $\frac{96}{100}$ dollars, ($3,926.96.)

We refer to:

Schroeder *vs.* Hartford Fire Ins. Co., 3 Otto., 241.
Western Union Tel. Co. *vs.* Rogers, Ib., 565.
Merrill *vs.* Petty, 16 Wall., 338, and cases there cited.

H. A. HERBERT,
For Motion.

Supreme Court of the United States,

OCTOBER TERM, 1877.

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THE MAYOR AND COUNCILMEN OF TROY, PLAINTIFFS IN ERROR,

vs.

EVANS, GARDNER & CO., DEFENDANTS IN ERROR.

BRIEF OF RICE, JONES & WILEY, ATT'YS FOR PLAINTIFF IN ERROR,

On Motion of Defendants in Error to Dismiss for want of Jurisdiction.

BARRETT & BROWN, PRINTERS.

Supreme Court of the United States,

OCTOBER TERM, 1877.

THE MAYOR AND COUNCILMEN OF TROY, PLAINTIFFS IN ERROR,
vs.
EVANS, GARDNER & CO., DEFENDANTS IN ERROR.

On Motion of Defendants in Error to Dismiss for want of Jurisdiction.

The motion to dismiss the writ of error, like the argument in its support, is founded upon the assumption, that this case is one of that class, in which the action is upon a money demand merely, every instalment or part of which is shown in the body of the complaint to be due at the commencement of the action, and to be less, even with the addition of interest thereon up to the rendition of judgment, than the amount requisite to give this court jurisdiction.

But the record makes manifest the error of that assumption, and proves that this case belongs to another and distinct class of cases, and is within the jurisdiction of this court.

Stinson v. Dousman, 20 Howard, 461.
Ryan v. Brindley, 1 Wallace, 66.
Bennett v. Butterworth, 8 Howard, 124.

The original complaint in this case was upon one hundred and twenty bonds of the defendant corporation for one hundred dollars each, and consisted of two counts. It showed that these bonds were payable in instalments, and that *only part of the instalments* with interest had become due at the commencement of this suit. The first count was upon fifty-seven of these bonds, and the second count was upon the

other sixty-three of said bonds. In each count, more than five thousand dollars on the bonds therein set forth was claimed by the plaintiffs in the action, although each count showed that the only instalments on the bonds therein set forth *which had become due at the commencement of this action, and were recoverable under the count singly*, were considerably less than five thousand dollars. The amount of the instalments shown by the two counts to be due at the commencement of the suit, with interest thereon up to the trial, largely exceeded five thousand dollars.

It is thus manifest from the counts, that "the matter in dispute," which was then claimed to be then actually due, exceeded five thousand dollars, and was sufficient to give this court jurisdiction.

But notwithstanding all this, the defendants in error earnestly insist, that the jurisdiction of this court has been lost or eluded by the proceedings in the suit which resulted in a verdict for them for only $3,926 96-100.

On the other hand, we insist that the jurisdiction of this court in such a case as the record shows this to be, can neither be lost, nor eluded, by any such proceedings as are shown in the record, even if they resulted in a verdict for only $3,926 96-100 for the plaintiffs in action.

To these proceedings the defendant corporation duly took exceptions as shown by the record, and can not be construed as assenting in any way to them. On the contrary, the defendant corporation objected and excepted to the striking out of the first count, which occurred under a suggestion of the presiding judge made to the counsel of the plaintiffs in the action, whilst making the closing speech to the jury, and without opportunity to the counsel of the defendant corporation afterwards to be heard in argument, or to demur or plead to the complaint as amended, or to introduce evidence as to this amended complaint.

The suggestion thus made by the presiding judge to "the plaintiff's attorney" whilst "making his closing speech to the jury" was, "that under the complaint as it was and un-

der the evidence as it was, the plaintiffs could not recover without amending the complaint, by reducing the claim of the plaintiffs in the complaint below the sum, or so as not to exceed the sum, which the foregoing evidence showed that said U. L. Jones owed the plaintiffs."

The record shows that upon this suggestion, "the attorney of the plaintiff asked leave of the court to amend the complaint by striking out the first count thereof"; that notwithstanding the objection of the defendant corporation, "the court allowed said amendment of the complaint, and defendant duly excepted to this ruling and decision of the court," and that "in allowing said amendment the court declined to allow any of the foregoing evidence" (the entire evidence adduced on the trial under both counts) "to be withdrawn by the plaintiffs."

The one hundred and twenty bonds described in the two counts of the complaint constituted part of the evidence which had been introduced by the plaintiffs in the action before said first count had been stricken out as aforesaid.

The right of the plaintiffs in the action to sue on the bonds as well as their title to them, was distinctly put in issue by the pleadings. The question thus raised, being the right to the property (the bonds) and the plaintiffs having shown in each count, that the bonds claimed by them in each count exceeded the amount of five thousand dollars, the defendant corporation is entitled to prosecute its writ of error, although one count was stricken out under the circumstances disclosed, and although the verdict for the plaintiff was for less than five thousand dollars.

Bennett v. Butterworth, 8 Howard, 124.
Phillips' Practice, 85–91.
Rodd v. Heart, 17 Wallace, 355.
United States, *ex rel*, v. Addison, 22 Howard, 174.

Upon the issue as to plaintiff's right or title to the bonds, a memorandum of agreement between plaintiffs and said U. L. Jones, executed on the 26th day of September, 1872, was

read in evidence and shown to be the foundation of the right of plaintiffs to said bonds, which agreement is set out in the record.

This agreement shows (among other things) that the interest in the bonds (the matter here in dispute) which was transferred to plaintiffs, was "valued by the parties (to that agreement) at eight thousand dollars," at least. In other words, in consideration of that transfer, the plaintiffs in the action agreed to let the said Jones have goods on them to the amount of eight thousand dollars by January 1st, 1873.

Stinson v. Dousman, 20 Howard, 461.

The plaintiffs agreed, that "should they succeed in collecting more than will pay the said U. L. Jones's indebtedness to the said Evans, Gardner & Co., AND ALL EXPENSES of every kind, including LAWYERS' FEES, *the balance* they the said Evans, Gardner & Co. are *to refund or pay over to the said U. L. Jones.*"

The testimony of Arthur Bingham, introduced by the defendant corporation and set forth in the record, shows that in May, 1873, after this suit was commenced, Evans, the leading member of the firm of Evans, Gardner & Co., deliberately admitted, that said Jones "turned the said bonds over to plaintiffs *as security for his indebtedness to plaintiffs for goods sold to Jones;* that the *said indebtedness* of Jones to plaintiffs was some $7,000 or $8,000," &c.

The said Jones in his testimony does not contradict this, nor state how much he owed plaintiffs for goods sold to him *before* he made with them said written contract as to the bonds. His statement is very loose and is as follows: "*Under that* contract, said plaintiffs let said Jones have, AT THE DATE *of the writing*" (September 26, 1872) "*about* $3,500 of merchandize, and *subsequently* (but before this suit was brought) *about* $700.00 worth in addition." He further testified, that he had been long a merchant, was well known to plaintiffs, that they had confidence in him and did not ask

him for collaterals. This suit was brought on or before October 31, 1873; and the trial was had May 27, 1875.

The charge of the court did not leave it to the jury to determine what was *the amount of the debt of Jones to plaintiffs and interest thereon up to the time of trial;* and under the charge of the court, it is clear that the jury could not and did not decide that question. On the contrary the charge expressly instructed the jury, that "*the amount now sued for will not more than cover this debt.*"

In a preceding part of the charge, the court had instructed the jury what *was sued for*, as the case stood after the aforementioned striking out of the first count of the complaint. This instruction of the court is in the following words:

"As the action now stands, the plaintiffs having stricken out the first count, the suit is for *three instalments due on sixty-three of the bonds*—each bond being for $100, and each instalment being for $10—and the interest due at the same time. That is, the plaintiffs sue for $30 of *principal on each bond*, amounting in all to $1,890, and *the interest* amounting to about $1,700, in all about $3,600, with interest on the entire sum to the present time. The calculations will be furnished by counsel."

Afterwards, but in the same charge, the court employed the following language:

"Now it is apparent that the plaintiffs are beneficially interested to the extent of their debt. *The amount now sued for* will not more than cover this debt, and we charge the jury that *they are entitled to recover this amount*," (that is, *the amount sued for* as set forth in the preceding part of the charge), "although they actually hold a large amount of additional bonds in their hands."

Under and in obedience to *this charge*, the verdict was rendered in favor of plaintiffs for $3,926 96-100, being the amount, *not of the indebtedness of Jones to the plaintiffs*, nor of the bonds described in the second count, but of the three ten per cent. instalments due *on the bonds* at the commencement of the suit

and the interest due on account of the sixty-three bonds described in the second count, up to the time of the trial (May 27, 1875).

From what above appears, as well as from the entire record, it is clear—1st. that *the amount of Jones's indebtedness to the plaintiffs and the interest thereon up to the time of the trial*, was not decided either by the court or the jury—2d. that the court in its charge did assert as a fact, that "*the amount now sued for*," (that is, the three past due instalments and interest *on the sixty-three bonds* described in the second count,) "will not more than cover this debt."

It is evident that although the instalments on the bonds described in the second count not due at the commencement of this suit, could not, for that reason, be recovered in this suit, yet the verdict and judgment in favor of plaintiffs in this suit, for the past due instalments, *conclusively determines* the plaintiffs right to recover the future instalments, at least so long as *any thing remains uncollected* of what they are entitled to claim under their said contract with Jones. In other words, the plaintiffs claim in their second count *as their property* the sixty-three bonds therein described, the amount of which is largely in excess of five thousand dollars. Although part of the instalments on those bonds is not due and therefore not recoverable in this suit, yet *all the instalments*, whether due or not, were *in dispute* in this action. And thus the amount in dispute under said second count, exceeded five thousand dollars.

See Rakes v. Pope, 7 Ala. R. 161.
Stinson v. Dousman, and other authorities herein cited.
Birckhead v. Brown, 5 Sandford's Rep. 145.
Gardner v. Buckbee, 3 Cowen, 120.
Burt v. Sternberg, 4 Cowen, 559.
Gould v. Evansville & Crawf. R. R. Co., 1 Otto, 526.
Cromwell v. Sac County, 4 Otto, 351.

The mere fact, that the verdict in this case was for an

amount not exceeding five thousand dollars, is fully explained by the record; and as thus explained, is clearly insufficient to establish the proposition that the writ of error sued out by the defendant corporation ought to be dismissed for want of jurisdiction.

It is manifest, that the amount of said debt of Jones to plaintiffs and interest thereon up to the trial, largely exceeded the amount which plaintiffs did recover; and that they did recover all that was legally recoverable under their complaint as it stood after the first count had been stricken out; and that this recovery is conclusive in their favor in any future suit brought for the instalments of the bonds mentioned in their second count *falling due after* the commencement of this suit, at least so long as any part of said debt of Jones, or of the expenses of collection, including lawyers fees," remains *uncollected* by plaintiffs.

It is believed, that upon the testimony of Bingham and of Jones, (the only testimony on the point), any court or jury would find that the amount of said Jones' debt to plaintiffs, with interest thereon up to the trial, exceeded five thousand dollars. Jones does not pretend to say, that said debt consisted of only two items. He mentions only two, and does not pretend to give the precise amount of either of them; he puts them loosely at "*about* $3,500," and "*about* $700;" he shows that each of these items was for goods sold to him by plaintiffs *at or soon after* September 26, 1872, the time when he transferred the bonds to plaintiffs as collateral security for eight thousand dollars worth of goods, if he should purchase to that amount. It would be strange, that Jones' first purchase of goods should be exactly $3,500, and that his second purchase should be exactly $700. Jones does not say that these were the precise sums; the most that he says is, that these are "*about*" the sums. He does not pretend that he has made any payment. Now, look to the deliberate statement of Evans, the leading member of plaintiffs firm, made in the Spring of 1873, when the transactions were fresh,

and proved by Arthur Bingham, "that the said indebtedness of Jones to plaintiffs was some $7,000 or $8,000." There is no ground either in reason or law, for rejecting altogether this deliberate statement of the leading plaintiff, or for denying to it any and all force as evidence against his firm. Unless this be done, the plain inference is, that the debt of Jones was certainly considerably larger than $4,200. Even rejecting altogether the statement of Evans, it is not a strained or unnatural inference from Jones's own loose statement of his own indebtedness, that if accurately stated, it was from fifty to one hundred dollars more than the aggregate of $3,500 and $700. Taking the statement of Jones and the statement of Evans together, and presuming each to be honest, and trying to reconcile these statements, it would be liberal to Jones to conclude that when he said "*about* $3,500," he did not mean that it was not more than $3,550, and when he said "*about* $700, he did not mean that it was not more than $750. The testimony of Jones and the statement of Evans warrant any court or jury in concluding that the debt of Jones was at least more than $4,260 before January 1st, 1873. Taking it even at $4,260, and adding interest at 7 per cent. from January 1st, 1873, to May 27, 1875, the day of the trial, and the amount exceeds $5,000.

But under the contract of September 26, 1872, between Jones and plaintiffs, the plaintiffs are entitled *to collect* out of the said bonds, not only the amount Jones owed them *for goods* sold to him, but also "*all expenses of every kind, including lawyers fees.*"

As the recovery of the plaintiffs in this case, is materially less than the amount Jones owes them *for goods*, without even counting the expenses and lawyers fees, it is certain that plaintiffs can bring a second suit against the defendant corporation, to recover the instalments *which have become due on the same bonds described in the second count, since the present suit was commenced;* and that in such second suit the verdict

and judgment in the present suit (if not reversed) will be conclusive in favor of plaintiffs and against the defendant corporation.

Rakes v. Pope, 7 Ala. R. 161.

Hence, it follows, that although the verdict in this suit is for only $3,926 96-100, the matter in dispute in this suit and conclusively settled by it, was, at the trial, not less than the amount of *said debt* of Jones *for goods and* "*all* expenses, including lawyers fees" and interest up to the time of trial—all of which together constituted an amount exceeding $5,000, at the trial.

Considering the relation which attorneys at law sustain to the courts, the nature of their duties and the judicial knowledge which the courts have touching their right to fees, and the presumption which courts must indulge that such officers of the court have done their duty, the courts must judicially know or presume that the fees of the plaintiffs lawyers, in such a case as this, were not at the trial less than 1 per cent. on the amount for which judgment was rendered. Surely the courts can not *presume* that the attorneys were not entitled to any fees, or that the fees to which they are entitled are less than thirty-nine dollars. And if the fees of plaintiffs attorneys at the trial are put at the low figure of thirty-nine dollars, then this case is within the jurisdiction of this court, even upon the concession that its jurisdiction depends upon the amount which the plaintiffs were entitled *to collect* and enjoy under their said contract with Jones, and upon the further concession that when Jones, in relation to his purchases of goods, stated "*about* $3,500," he meant *exactly* $3,500, and when he stated "*about* $700," he meant exactly $700.

Upon these concessions (made only for the sake of argument), plaintiffs would be entitled to *collect* out of the bonds the following amounts for the following items:

For goods sold to Jones September 26, 1872,.....	$3,500.00
Interest thereon at 7 per cent. from Oct. 31, 1872, to the trial....	653.33
For goods sold Jones before October 1, 1872.....	700.00
Interest thereon from that day to the trial.....	126.00
Fees of plaintiffs lawyers at the trial not less than.....	39.00
	$5,018.33

If interest on the debt of Jones for *goods*, is counted at *eight* per cent., the lawful interest in Alabama, *where he resided*, that debt and interest exceeded $5,000 at the trial, without counting any lawyers fees.

In every point of view, there seems to be no legal ground for the conclusion, that at the trial the amount in dispute in this case did not exceed $5,000.

Satisfactory evidence *aliunde* is herewith submitted that the fees of plaintiffs attorneys, at the trial, exceeded three hundred dollars.

Where a municipal corporation issues its bonds without coupons, under statutory authority, to aid in the completion of a particular railroad, payable in ten annual instalments with interest; and when only three of the instalments have become due, this corporation is sued at law in a circuit court of the United States, by plaintiffs whose names do not appear in or upon the bonds, and the plaintiffs complaint consists of two counts, in the first of which they describe fifty-seven of said bonds, each for one hundred dollars, and claim the right and title to them, and in the second of which they describe sixty-three of said bonds, each for one hundred dollars, and claim the right and title to them; and the right and title of the plaintiffs to all of said bonds is duly denied and put in issue by the defendant; if a verdict and judgment be rendered for the plaintiffs, although for less than five thousand dollars, on a writ of error duly issued and returned to this court at defendant's instance to reverse said judgment, this court has jurisdiction.

In such case, the jurisdiction of this court is not lost or destroyed by striking out the first count at such stage of the trial and under such circumstances as are shown in the record in this case.

When in such suit, the first count is stricken out during the closing speech of plaintiffs' counsel to the jury, and the verdict and judgment are rendered upon the second count only, if that verdict and judgment be for the plaintiffs, although for a less sum than five thousand dollars, a writ of error duly issued and returned to this court at the instance of defendant to reverse said judgment, will not be dismissed on the ground that the matter in dispute did not exceed five thousand dollars. The matter in dispute can not, in legal contemplation, be confined to the mere instalments which were due upon such bonds when the suit was instituted, but embraced other instalments, although not due when this suit was brought, and, therefore, not recoverable in this suit; or embraced the amount which plaintiffs were entitled by their contract with Jones (consisting of goods sold and interest thereon and expenses of collecting, including lawyers fees), *to collect out of the bonds*, which amount exceeded $5,000.

RICE, JONES & WILEY,
Attorneys for Plaintiff in Error.